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In the Supreme Court of the United States

PHILIP MORRIS USA, PETITIONER
v.
MAYOLA WILLIAMS, RESPONDENT

On Writ Of Certiorari
To The Supreme Court Of Oregon

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE AMERICAN CHEMISTRY COUNCIL, AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Although this Court granted review of two questions, *amici curiae* will address only the following question: Whether due process permits a jury to punish a defendant based on alleged harm to non-parties, where the named plaintiff has not satisfied the requirements for proceeding in a class action format or otherwise established that she and the non-parties have such common interests that any judgment as to her should have preclusive effect in future actions involving the non-parties.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

This case illustrates a practice, all too common in modern civil litigation, in which plaintiffs' lawyers urge juries to use punitive damage awards to "send a message" to corporate defendants—not only for the conduct at issue in the case at hand, but for alleged harms to third parties whose claims were not tried to the jury. These appeals, moreover, are made without satisfying the requirements for class action suits, adopted in virtually every jurisdiction, or establishing by other means that the non-parties have such a common interest with the named plaintiff that a judgment on the named plaintiff's claim should have preclusive effect in future cases brought by the non-parties. In addition, juries are often told that federal and state regulatory agencies have failed to provide adequate protection against corporate wrongdoing, and that the jurors must do the job that the government failed to do. As a result, punitive-damages claims all too often devolve into a kind of quasi-class-action litigation, undertaken with the purpose and effect of displacing (or at least second-guessing) the regulatory regimes established by elected public officials.

Amici Curiae are associations of corporations, and their most senior officers, representing some of the largest sectors of the nation's economy. They believe that allowing punitive damages for harm to non-parties is not only bad for American businesses, their employees, and the customers they serve, but also inconsistent with historical practice under the common law and contemporary practice under the class action procedures of every State. Such awards deprive defendants of their property without notice and an opportunity to be heard, in violation of core principles of procedural due process.[1]

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or

A more complete statement of interest of each *amicus* is set forth in Appendix A to this brief.

STATEMENT

Like most cases in which punitive damages are sought, this case arises from a tragic event—the death of Jesse Williams, who smoked cigarettes for about 47 years. Pet. App. 2a. Respondent, Williams' widow, sued petitioner for negligence and fraud, alleging that Williams' death resulted from his reliance on petitioner's campaign to undercut public information about the risks of smoking. The jury found that Williams was 50 percent responsible for his own injury. Nevertheless, it found petitioner liable for negligence and fraud and awarded respondent $21,485.80 in economic damages and $800,000 in non-economic damages.

Respondent also sought punitive damages based in large part on respondent's suggestion in closing argument that petitioner's alleged misconduct must have harmed thousands of other smokers—three or four percent of all smokers in Oregon. Respondent, however, adduced no evidence that could support a finding that anyone other than Williams actually relied on petitioner's alleged misrepresentations or that those misrepresentations actually caused injuries to any other person. Accordingly, to ensure that the jury could not award damages based on unproven injuries to non-parties, petitioner requested an instruction directing the jury that it was '"not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit." Pet. App. 17a-18a. The court refused to give this instruction, and the jury returned a $79.5 million punitive award. The Oregon Supreme Court ultimately affirmed the award in its entirety,

---

submission of the brief. Pursuant to Rule 37.3(a), petitioner and respondent have filed with the Court a blanket consent for all *amici*.

holding that it was wholly proper for the jury to impose punitive damages for harms to non-parties. *Id.* at 20a-21a.

SUMMARY OF ARGUMENT

I. The Oregon Supreme Court's decision illustrates an all-too-frequent tendency of punitive-damages litigation to become, contrary to this Court's admonition, "a platform to expose, and punish, the perceived deficiencies" of a defendant's or industry's operations "throughout the country." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 420 (2003). That is because, in too many cases, trial courts allow plaintiffs to recover punitive damages from defendants based on unadjudicated allegations of harm to non-parties. Indeed, trial courts allow plaintiffs to recover such damages without satisfying the requirements of a class action or otherwise establishing that the non-parties have such a common interest with the plaintiff that a judgment in her case would be binding in later cases brought by the non-parties.

Such practices effectively circumvent the rule that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims." *Id.* at 423. In some cases they also violate the rule prohibiting States from regulating conduct outside their jurisdictions. *Id.* at 421. And they often have significant ripple effects because a single large punitive damages award typically serves as a bellwether for settlement—dramatically increasing the leverage of those who seek to impose quasi-regulatory demands on entire industries.

II. Both traditional and contemporary notions of due process prohibit imposing punitive damages for harms to non-parties whose claims the defendant has not had a meaningful opportunity to contest. To be sure, the law has long permitted plaintiffs whose claims are *representative* of others' claims to recover on behalf of the group. For as long as representative actions have existed, however, courts have required named plaintiffs to establish that the others whom

they seek to represent have such a common interest with the named plaintiff that the judgment on behalf of the class representative may fairly be given preclusive effect in future cases. As the Court stated in *Smith* v. *Swormstedt*, where "a few are permitted to sue * * * on behalf of the many, *care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.*" 57 U.S. (16 How.) 288, 303 (1853) (emphasis added).

Today, this basic sense of fairness is reflected in the class action rules of virtually every State. Those rules require plaintiffs to satisfy requirements such as commonality and typicality to ensure that defendants are not deprived of a hearing on issues that require individualized determinations. But even if a class action were not the exclusive means of recovering for harm to non-parties (which is the most reasonable inference to be drawn from the class action rules), the requirements for representation may not be dispensed with altogether. To allow a plaintiff to recover damages for alleged class-wide wrongs without establishing that her claims are truly representative of the class, or that the other requirements for representative actions are satisfied, deprives the defendant of any opportunity for an effective defense. Such a practice also threatens to subject defendants to multiple liability for the same wrongs, because non-parties who later bring their own claims are not barred from recovering by the rules of claim preclusion that would apply if the earlier suit had been certified as a class action.

ARGUMENT

The decision below illustrates why juries may not be allowed to impose punitive damages based on alleged harm to non-parties. Part I of this brief describes the various ways in which plaintiffs' lawyers, with the blessing of trial courts, use punitive damage claims to convert ordinary civil cases into quasi-class-action litigation, often in an attempt to impose sweeping regulation on entire industries. Part II explains how this practice deprives civil defendants of their opportunity to defend themselves against the non-parties'

claims and subjects them to the risk of multiple liability for the same conduct—in violation of due process.

I. The Presentation Of Punitive Damages Claims Often Violates This Court's Admonition Against Allowing Punitive Damages Litigation To Become "A Platform To Expose And Punish" A Company's Or Industry's "Perceived Deficiencies" In Its Dealings With Third Parties.

This Court has previously explained that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *State Farm*, 538 U.S. at 423. But that is precisely what the Oregon courts allowed the jury to do in this case. The trial judge refused to instruct the jury that it was not allowed to punish petitioner for alleged harms to non-parties. And respondent's counsel took full advantage, seeking a punitive damages award based on the theory that three or four percent of all smokers in Oregon would get cancer from smoking Marlboros. See Pet. 2. Indeed, in closing argument respondent's counsel expressly appealed to the jury to punish petitioner for those alleged harms: "It's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future." *Ibid.*

As explained below, such tactics are all too common in modern punitive-damages litigation. Sometimes, as in this case, the plea is overt. Other times it is less direct. But in either case the result violates this Court's admonition that punitive-damages litigation must not become merely "a platform to expose, and punish, the perceived deficiencies of [the defendant's or the industry's] operations throughout the country." *State Farm*, 538 U.S. at 420.

A. Juries Are Often Asked To Base Punitive Awards On Harm To Third Parties.

One of the most common means by which plaintiffs' counsel attempt to obtain large punitive awards is by directly invoking alleged harms to parties not before the court. Indeed, in many cases plaintiffs' counsel neglect not only to prove any *damages* to these non-parties, but to prove that they are similarly situated to the plaintiff in any critical respect. Examples are collected in Appendix B to this brief.

GMAC v. *Baymon*, an insurance case, is illustrative. See App. 3a. There the plaintiff sued GMAC for fraud, claiming that she was overcharged by $762 for automobile insurance. Plaintiff's counsel exhorted the jury to do justice for the "600,000 other Menola Baymon[s] in Humphreys County, in Sunflower County, in Holmes County, in Memphis, Tennessee, and everywhere else in this country." *Ibid.* The jury awarded just $35,000 in compensatory damages, but tacked on a $5 million punitive damages award.

Similarly, in *Bullock* v. *Philip Morris USA, Inc.*, App. 4a, another smoking-and-health case, the plaintiff's counsel appealed to the jury to impose punitive damages based on the allegation that for every smoker who sues Philip Morris, 28,000 die from smoking. The jury obliged, awarding $28 billion in punitive damages—$1 million for each of the 28,000 people referenced in the plaintiff's closing argument.

Likewise, in *Diamond* v. *General American Life Insurance Co.*, App. 5a, a case involving an insurer's interpretation of a five-year limitation on disability benefits, the plaintiff was allowed to introduce evidence that the insurer had identified a total of 58 policyholders (including the plaintiff) with large potential claims and attempted to buy out their policies at discounts. Plaintiff's counsel repeatedly referred to the 57 other policyholders in seeking punitive damages, and the jury imposed a punitive award of $58 million—exactly 58 times the amount of the compensatory award. As the trial court recognized, the jury "almost to a certainty" arrived at

its punitive award by multiplying $1 million by the policyholders whose alleged harms were not proven at trial and adding $1 million for the plaintiff. App. 6a. Even so, the court let $18 million of the punitive award stand.

A similar appeal to the jury was made in *Brown* v. *Borg Warner*, a recent asbestos case. See App. 3a. There the plaintiff, a mechanic, brought suit seeking recovery for harm from exposure to asbestos in disc brakes. The plaintiff did not seek to establish the similarity of any non-party's claims to his own, let alone to certify a class. Nonetheless, his counsel's appeal for punitive damages was based on harm to non-parties who supposedly suffered similar injuries: "[if] the Borg Warner Corporation and the asbestos industry turned its back on safety and closed its eyes on the health of others, then it is your duty and responsibility to award a substantial amount of exemplary damages" not only for "William Brown individually, but [for] all the William Browns * * * out there doing their job." App. 4a.

The plaintiff's counsel then emphasized the same point in a manner calculated to result in the largest possible punitive award: "And let me assure you, ladies and gentlemen, that your voice will be heard. It will be heard in Chicago by the Borg Warner Corporation. It will be heard by an industry and it will be heard by all the William Browns of the world, and by all the corporations that would turn their back and close their eyes to the safety and welfare of the working people." *Ibid.*

City of Modesto v. *The Dow Chemical Company*, provides yet another illustration of this practice. See App. 11a. There, a city sued makers of perchloroethylene, a dry cleaning agent, and makers of dry cleaning equipment, alleging that perchloroethylene was defective and that the defendants were responsible for contaminating city water. During its appeal for punitive damages, the city repeatedly invited the jury to punish the defendants for contaminating wells nationwide. In so doing, the city invoked a single study

suggesting that 7 to 10 percent of wells nationwide contain *some* level of perchloroethylene:

> What would a responsible corporation do if they learned that their product was in 10 percent of the wells in the country? * * *
>
> If you know that your product has caused a problem of that magnitude, you can't blame it on a mom-and-pop dry cleaner. That couldn't do something all over the country. * * *
>
> [T]hey acted in conscious disregard of cities like Modesto and other communities throughout the country.
>
> After all, if we're talking about 10 percent of the wells in America, you're talking about the water supply for very large numbers, probably millions of people.

Ibid. The city, of course, had not even attempted to prove that the defendants were responsible for the presence of perchloroethylene in other communities' wells, let alone that such contamination was unlawful or harmed anyone. But that did not stop the jury from imposing $175 million in punitive damages on top of a $3.2 million compensatory award. As the jury's foreman told the press: "We wanted to send a message that this product should be taken off the market." See Dennis Pfaff, *Jury Orders $175 Million to Be Paid by Chemical Firms*, San Francisco Daily J. (June 14, 2006), at 2.

These are just some of the myriad cases in which jurors have been invited and allowed to base punitive awards on unadjudicated allegations of harm to non-parties. See Appendix B.

B. Such Requests Are Often Coupled With Explicit Or Implicit Pleas That Juries Must Assume A Leading Role In Regulating The Conduct Of Corporate Defendants And, In Many Cases, Entire Industries.

In arguing for punitive damages, plaintiffs' lawyers generally (though not always) adhere to the letter of this

Court's ruling in *State Farm* that States have no "legitimate concern" in allowing juries to "impos[e] punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." 538 U.S. at 421; see also *BMW of North Am.* v. *Gore*, 517 U.S. 559, 571 (1996). Nonetheless, plaintiffs' counsel frequently achieve the same result—and thereby also obtain damages for harms to third parties—by inviting jurors to serve as regulators of the entire industry of which the defendant is a part. This is yet another way in which punitive-damages litigation becomes a "platform" to punish a company's or an industry's "operations throughout the country." *State Farm*, 538 U.S. at 420.

1. As the *City of Modesto* case confirms, counsel seeking punitive damage awards often explicitly encourage juries to award punitive damages at such a level as to take a product "off the market." Indeed, as Judge Kozinski has observed:

> [J]urors across the country are regularly urged to impose punitive damages large enough to "send a message" to the defendant and others similarly situated. *** Interviews with jurors in case after case reveal that they have taken these admonitions to heart and have imposed punitive damages to "teach 'em a lesson" or "send a message." *** The message juries send is basically "Stop." Implicit in this is a judgment that the conduct in question is not merely tortious, meaning that those engaging in it should pay compensation when someone gets injured, but so wrongful that it should be abandoned altogether.

Alex Kozinski, *The Case of Punitive Damages v. Democracy*, Wall St. J. (Jan. 19, 1995), at A18.

Our research confirms Judge Kozinski's observations. For example, in a typical case involving a claim that the drug Pondimin (sometimes used in a combination called "fen-phen") was unreasonably dangerous, plaintiffs' counsel told the jury:

> You are more powerful right now than I'll ever be. You are more powerful than anyone in this room, in this city, in this state, or in this nation with regard to what you can say to a huge drug company and how you can get them to change. * * *
>
> [Y]ou are the voice of this community, this county, this state, this nation. * * * [Y]ou have the ability to make huge changes in the pharmaceutical industry and to make a huge change in this company. Send them a message. * * *
>
> Your verdict is going to be read by their CEO and by their board of directors, and by boards of directors of every pharmaceutical company in the world.

Batson v. *Wyeth*, App. 9a-10a. The jury obliged, awarding $25.35 million in punitive damages on top of a $3.9 million award of compensatory damages.

2. Other times juries are expressly invited to use punitive damages as a vehicle for establishing standards of conduct applicable to entire industries. For example, the plaintiff's counsel in *Brown* (discussed above) told the jury: "when you award exemplary damages, you establish standards of conduct, standards of decency, standards of corporate accountability, standards of corporate responsibility" for the disc brake industry. App. 4a.

Similarly, some plaintiffs' lawyers openly appeal to jurors to "send a message" to "others in the industry," to "warn [them] as to what the standards should be" (*Sunburst Sch. Dist. No* 2. v. *Texaco*, App. 14a), or to "change the way this insurance is done" (*GMAC* v. *Baymon*, App. 3a). See also *Flores* v. *Borg-Warner Corp.*, App. 15a ("send a message that the people of Corpus Christi, Texas are not gonna put up with this kind of behavior from Borg-Warner or from any other corporation"). Indeed, some such appeals to juries border on attempts to invite jurors to punish legal behavior. As the plaintiffs' counsel told the jury in a smoking-and-health case resulting in a $145 billion award of punitive

damages: "Legal don't make it right." *Engle* v. *Liggett Group, Inc.*, App. 8a.

In making such appeals, moreover, plaintiffs' lawyers often assert to juries that the existing regulatory regimes established through democratic means are inadequate or corrupt and that jurors must step into the vacuum. At the trial level in *State Farm*, for example, the plaintiff's attorneys argued: "The only regulators of insurance companies are jurors like you. * * * [Y]ou are the regulators. We do not have objective and effective regulators of the insurance industry." App. 11a. And in another typical case, plaintiff's counsel convinced a jury to return a $60 million punitive damages award against an auto maker by arguing: "[N]obody else is going to stop this. * * * The government's not going to do anything. The only way to stop the kind of misconduct that you've heard about in this case * * * is with the amount of your punitive damages verdict. * * * *You are the regulators.*" *Rodriguez* v. *Suzuki Motor*, App. 10a (emphasis added).

Similarly, in *Frankson* v. *Brown & Williamson Tobacco Corp.*, App. 9a, the plaintiff's counsel told the jury: "We're going to ask you to send a message to the defendant * * * and not just the defendant, but the tobacco industry and to corporate America as well." William Glaberson, *Punitive Award Sought for Smoker's Widow*, N.Y. Times (Jan. 8, 2004), at B3. He added: "You have the power, and if you don't do it, who will? Not President Bush. Not Governor Pataki. Not Judge Kramer [the trial judge]." *Punitive Award Asked of Jury in Tobacco Suit*, N.Y.L.J. (Jan. 8, 2004), at 1. The jury obliged, returning $350,000 in compensatory damages and $20 million in punitive damages. William Glaberson, *$8 Million Award to Widow Punishes Tobacco Company*, N.Y. Times (Jan. 10, 2004), at B1; see also *Lopez* v. *American Home Prods.*, App. 12a (awarding $45 million in punitive damages on top of a $11.6

million compensatory award, based on an appeal to "send a message to this country," "a message to Washington").[2]

Given these tactics, it is no wonder that runaway punitive damage awards have enabled plaintiffs' lawyers to exploit juries as "an unauthorized regulatory medium." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 283 (1984) (Powell, J., dissenting). Indeed, the specter of a huge punitive damage award is often the most powerful weapon at the disposal of plaintiffs' lawyers engaged in coordinated efforts to use the civil justice system to promote regulatory ends—including restrictions on tobacco, guns, and other products—that they have failed to achieve through the democratic process.[3]

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[2] Juries, moreover, have issued some of the largest punitive damage award in cases where the defendant's conduct was in strict compliance with federal regulations. For example, in *Buell-Wilson* v. *Ford Motor Co.*, 2006 WL 2002858 (Cal. Ct. App. July 19, 2006), juries awarded $369 million and $98 million in punitive damages against Ford and DaimlerChrysler, respectively, notwithstanding the auto makers' compliance with pertinent National Highway Traffic Safety Administration standards. Such awards threaten to subvert the regulatory systems established by elected officials and expert administrative agencies. Imposing punitive damages for quasi-regulatory purposes (*e.g.*, to induce a civil defendant to take its product off the market) thus implicates not only due process but also principles of preemption. Cf. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (state fraud-on-the-FDA claim was preempted by the Medical Devices Amendments of 1976); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000) (federal motor vehicle regulations preempted state-law defective design claims predicated on the failure to install airbags).

[3] As one commentator has noted, "[t]he advent of litigation about products such as tobacco, guns, and lead paint [in the mid-1990s] went well beyond the historical interactions of regulation and litigation that have been of concern in the literature. No longer was the issue one of litigation creating incentives that overlapped with those resulting from regulation. Rather, litigation was being used as the financial lever to force companies to accept negotiated

3. The regulatory effect of large punitive awards is magnified by consolidated proceedings, such as multidistrict litigations, where plaintiffs wield tremendous pressure in settlement negotiations. As Judge Easterbrook has observed: "Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-1016 (7th Cir. 2002).

Moreover, a single large punitive damages award often serves as a bellwether for settlement proceedings, vastly enhancing the leverage of the plaintiffs' lawyers in extracting quasi-regulatory demands from a company or industry. Through the settlement process, the regulatory effect of a single state jury's award is projected outside the state's borders, such that the "practical effect" is to "control conduct beyond the boundaries of the State," *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 336 (1989), notwithstanding *State Farm* and the cases on which it relied. See 538 U.S. at 421.

Like limiting punitive damage awards to a single-digit multiple of compensatory damages, making clear that juries are prohibited from punishing defendants for unproven harm to non-parties would prevent juries from assuming an unauthorized and anti-democratic role as nationwide regulators of product design and business behavior.

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regulatory policies as part of the litigation. Thus litigation led to regulation, but not regulation that went through the usual rule-making process as a result of careful analysis by government regulatory agencies subject to their legislative mandates. Rather, the parties in the lawsuit negotiated regulatory changes as part of the package to end the litigation." W. Kip Viscusi, *Regulation Through Litigation* 3 (2002).

II. Allowing Jurors To Punish Or Regulate Defendants Based Upon Alleged Harm To Third Parties Violates Both Historical And Contemporary Conceptions Of Procedural Due Process.

Historical and contemporary conceptions of due process give this Court ample tools for responding to this problem. This Court has emphasized "from its first due process cases[] [that] traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). More specifically, the "Nation's history, legal traditions, and practices * * * provide the crucial guideposts for responsible decisionmaking that direct and restrain [this Court's] exposition of the Due Process Clause." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (quotations and citation omitted). Moreover, where a practice is so aberrational as to depart from the "settled usages and modes of proceedings existing in the common and statute law," *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855), this Court will not hesitate to find that it violates due process. In short, "history and 'widely shared practice'" are "a guide to determining whether a particular state practice so departs from an accepted norm as to be presumptively violative of due process." *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion); see *Oberg*, 512 U.S. at 421 ("abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that [a State's] procedures violate the Due Process Clause").

As shown below, neither traditional nor contemporary notions of procedural due process permit the imposition of punitive damages for alleged harms to non-parties where (a) the defendant has not had a fair, meaningful opportunity to contest, conclusively, the claims of those non-parties, or (b) the defendant lacks adequate notice that it could be punished for alleged harm to third parties. Indeed, when the Court in *State Farm* noted that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate

the merits of other parties' hypothetical claims against a defendant" (538 U.S. at 423), it was expressing a rule of law deeply rooted not only in the common law, but also in the contemporary practice of every American jurisdiction.

A. Punishing A Defendant For Alleged Harm To Third Parties Violates Due Process When The Named Plaintiff's Claim Is Not Genuinely Representative Of The Third Parties' Claims.

It has long been settled that due process entitles civil defendants to an "opportunity to answer," *Murray's Lessee*, 59 U.S. (18 How.) at 280; a "right to be heard" on the claims asserted against them, *Ownbey* v. *Morgan*, 256 U.S. 94, 111 (1921); and a chance to "present every available defense," *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972). The means by which these rights are protected may vary somewhat with "the nature of the proceeding and the character of the rights which may be affected by it." *Dohany* v. *Rogers*, 281 U.S. 362, 369 (1930). But in all cases they must be protected. As the Court put it in *Goldberg* v. *Kelly*: "The fundamental requisite of due process of law is the opportunity to be heard." 397 U.S. 254, 267 (1970) (quotations omitted).

Here, however, petitioner was denied any reasonable "opportunity to be heard" on the alleged harms to the thousands of unidentified Oregon smokers on which the jury based its punitive award. Respondent did not call any of these non-parties as witnesses at trial; she did not give notice of their identities at any point before trial; and she did not attempt to show that they had such a commonality of interest with her that any judgment in the case should be binding on those parties in later cases. In such circumstances, petitioner could not fairly investigate, much less refute, the named plaintiff's allegations of harm to these non-parties.

Allowing a jury to punish petitioner for these harms without giving it an adequate opportunity to be heard, and without procedures to ensure that any judgment will have a preclusive effect in future litigation, is a flat violation of due

process. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269; accord, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36 (2004). Yet petitioner had no opportunity to test the claims of its alleged victims, and thus no "reasonable opportunity to be heard and to present [its] * * * defense" as to those claims. *Dohany*, 281 U.S. at 362.

That is not to say that punishing defendants for harm to absent persons is *always* unconstitutional. The law has long permitted plaintiffs to bring representative suits on behalf of others similarly situated, enabling the named plaintiff to recover damages based in part on harms to others. However, for as long as the law has allowed such suits, it has insisted that the named plaintiff's claims be genuinely representative of the non-parties' claims *and* that there be such a commonality of interest that a judgment in the initial case will have preclusive effect in subsequent litigation involving those same non-parties. As we now show, neither historic nor contemporary practice allows the imposition of damages (punitive or otherwise) based on harms to non-parties where these conditions have not been satisfied.

1. *Historic Practice.* It was the general rule in equity that "all persons materially interested" in a case "ought to be made parties to the suit, however numerous they may be." *West* v. *Randall*, 29 F. Cas. 718, 721 (C.C.D. R.I. 1820) (Story, Circuit Justice). Equity made an exception, however, where "the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes,

and may be fairly supposed to represent the rights and interests of the whole." *Ibid.*[4]

Thus, Justice Story approved a representative suit against a "class" of defendants where "[t]here is no complaint * * * that the defendants now before the court do not represent effectually the interests adverse to the plaintiffs." See *Wood* v. *Dummer*, 30 F. Cas. 435, 439 (C.C.D. Me. 1824) (Story, Circuit Justice). And the Court in *Beatty* v. *Kurtz*, 27 U.S. (2 Pet.) 566, 579, 585 (1829), held that the trustees of a religious congregation could sue "in behalf of themselves and the members of the said church" because they belonged to a "voluntary society" and were bound with the non-parties by a "common interest" in the subject-matter of the suit, namely, the ownership and use of church property.

Throughout the nineteenth century, this Court repeatedly reaffirmed the necessity of proper representation *both* to ensure that the legal and factual issues in the case are fully and adequately litigated *and* to justify giving any judgment preclusive effect as to non-parties.

The leading case was *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288 (1853). It involved a dispute between the northern and southern branches of the Methodist Episcopal Church over rights to the "Book Concern," the denomination's publishing business operated for the benefit of its ministers. The complainants filed suit on behalf of themselves, the constituent conferences of the southern branch, and all 1,500 ministers associated with the southern branch, against two agents of the Book Concern, other members of the northern

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[4] The early American practice mirrored the practice in English courts. See *Discart* v. *Otes*, 30 Seld. Society 137, at xxxvii (No. 158, P.C. 1309) (1914) (holding that "a single complainant should argue the case" for "all similar complaints"); see generally Stephen C. Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation*, 27 UCLA L. Rev. 514, 515 (1980) (explaining that, historically, "[common] interest has acted as a lowest common denominator" for representative actions).

branch, and the 3,800 ministers associated with the northern branch. See *id.* at 300.

The defendants asserted that a representative suit was inappropriate, but the Court disagreed. "The rule is well established," the Court observed, "that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." *Id.* at 302.

Nonetheless, the Court also emphasized the importance of strict adherence to the traditional requirements for representative suits. Rehearsing Justice Story's discussion of such suits, the Court explained that because "the rights of the several persons may be separate and distinct," "there must be a common interest or a common right, which the bill seeks to establish or enforce." *Ibid.* Moreover, the Court cautioned that where "a few are permitted to sue and defend on behalf of the many, * * * *care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.*" *Id.* at 303 (emphasis added).

The Court thus approved the use of a representative suit where there were "some fifteen hundred persons represented by the complainants, and over double that number by the defendants," each side promoting adverse claims to a single fund. *Ibid.* But the suit could proceed—and non-parties could be bound by the resulting judgment—*only* because "[t]he legal and equitable rights and liabilities of all being before the court *by representation*, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." *Ibid.*

This Court's insistence upon common interests and genuine representation is also highlighted by an earlier decision, *Ayres* v. *Cooper*, 58 U.S. (17 How.) 591 (1854). There the Court observed that a representative suit was

inappropriate where "[i]t is difficult to see any interest or estate in common among these several defendants, that would authorize the rights of the absent parties to be represented in the litigation by those upon whom process has been served." And in *McArthur* v. *Scott*, 113 U.S. 340 (1885), the Court held that a plaintiff could not be bound by a prior judgment in a representative suit contesting a will where the plaintiff's interest (under the terms of the will) was not represented in that suit. "[W]here a suit is brought by or against a few individuals as representing a numerous class, that fact must be alleged of record, so as to present to the court the question whether sufficient parties are before it to properly represent the rights of all." *Id.* at 395. Because the bill in equity did not identify the plaintiff as a potential beneficiary under the will, the Court concluded that "the verdict and decree were entered without any real contest, and that the heirs at law, whose interest it was to set aside the will, in fact controlled both sides of the controversy." *Id.* at 394, 395.

This linkage of genuine representation and inclusion in the judgment persisted into the twentieth century and, indeed, persists today. In *Wallace* v. *Adams*, 204 U.S. 415, 425 (1907), for example, the Court stated that "it is undoubtedly within the power of a court of equity to name as defendants a few individuals who are in fact the representatives of a large class having a common interest or a common right—a class too large to be all conveniently brought into court—and make the decree effective not merely upon those individuals, but also upon the class represented by them." And in *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 367 (1921), the Court explained that "[i]f the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented." Of course, binding the non-parties was essential to make the decree "effective" and to avoid "conflicting judgments." *Ibid.*

Traditional practice in state courts considering punitive damage awards likewise reflects this Court's concerns about the fairness of representative litigation to parties and non-parties alike. As one scholar has noted: "Historically, * * * punitive damages, even when regarded as punishment, were consciously limited to the amount necessary to punish the defendant for the wrong done, and the harm caused, *to the individual plaintiff only.*" See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 628 (2003) (emphasis added).

For example, the court in *Phelin* v. *Kenderdine*, 20 Pa. 354, 362 (1853), upheld an award of punitive damages to a father who established a claim for the seduction of his daughter, but agreed with the defendant that "the jury [could] *not* award to the father any part of the damages which belong to the daughter." See also *Stevenson* v. *Belknap*, 6 Iowa 97, 101 (1858) (holding that both father and daughter could recover punitive damages but that each was limited to "damages resulting to the plaintiff alone, and not to another"); *Coil* v. *Wallace*, 24 N.J.L. 291, 314-315 (1854) (holding that each victim in a seduction case was entitled to a separate punitive damages award "not flagrantly excessive or disproportionate to the injury"). The courts in these cases understood that the damage to the father was *of a different kind* than the damage to his daughter, and that the interests of father and daughter were insufficiently common, such that he could not fairly represent her. Accordingly, even though a single act by a single defendant resulted in harm to both father and daughter, those harms were distinct and neither victim could recover for the harms done to the other.[5]

[5] Other courts have even imposed evidentiary restrictions to ensure that juries could not punish defendants for alleged harms to persons not before the court. *E.g.*, *Weaver* v. *Bachert*, 2 Pa. 80, 82 (1845) (explaining that the defendant could not "be doubly exposed to vindicatory damages"); *Foster* v. *Scoffield*, 1 John. 297, 299 (N.Y.

2. *Contemporary Practice.* The historic practice of requiring that the plaintiff have a genuinely common interest with any non-parties for which she seeks recovery has continued since the adoption of the Federal Rules of Civil Procedure in 1938. Just two years after promulgation of the Rules, this Court held in *Hansberry* v. *Lee*, 311 U.S. 32, 45-46 (1940), that a non-party whose interests were not adequately represented by the named plaintiff in a prior representative suit could not be bound by the judgment in that suit.

The plaintiffs in *Hansberry* sued to enjoin the defendants from breaching a restrictive covenant that forbade the sale of certain property to African-Americans. The defendants challenged the covenant on the ground that it had not been approved by the requisite number of property owners, but the state court held that litigation of that issue was foreclosed by a prior decision in a suit brought by a property owner, "in behalf of herself and other property owners in like situation," to enforce the covenant. *Id.* at 39.

This Court reversed, holding that the African-Americans seeking to *invalidate* the covenant had not been adequately represented by the parties who earlier sought to *enforce* that covenant (that is, they lacked a common interest), and thus could not be bound by the decision in the earlier suit. *Ibid.* Holding a non-party to a judgment obtained by parties whose "substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Ibid.* As the Court later stated, citing *Hansberry*: "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co.*

Sup. Ct. 1806). As the Michigan Supreme Court explained the general rule: "The foundation of exemplary damages * * * rests on the wrong done willfully to the complaining party, and not to wrong done without reference to that party." *Ganssly* v. *Perkins*, 30 Mich. 492, 495 (1874).

v. *Shutts*, 472 U.S. 797, 812 (1985); accord *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996); *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 329 (1971).

Modern practice under Rule 23 and its state-law analogs reflects this Court's insistence on a common interest between a representative plaintiff and the nonparties she seeks to represent. To prosecute a class action under these rules, the named plaintiff must demonstrate not only that "there are questions of law or fact common to the class," but also that her claims are "typical" of the non-parties' claims and that she will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a); see also *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997) (describing the "threshold requirements" for class certification). To that end, this Court has held that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members," and that the requirements of Rule 23(a) "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 156 (1982) (quotations omitted). Moreover, even where class treatment of some issues is appropriate, the law may require individualized treatment of others, including damages. See Fed. R. Civ. P. 23(c)(4); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977).[6]

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[6] Even where a plaintiff satisfies due process and the requirements of Rule 23(a), it may not be appropriate to certify a class. Under Fed. R. Civ. P. 23(b)(3), for example, the court must further "find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This standard will rarely if ever be satisfied in the context of smoking-and-health litigation. See, *e.g.*, *Barnes* v. *American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

The commonality and typicality requirements also ensure that named plaintiffs' claims genuinely represent non-parties' claims. *Falcon*, 457 U.S. at 157 n.13 (describing the requirements as "guideposts for determining whether * * * the named plaintiff's claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence"). If the named plaintiff's claim is typical of the non-parties' claims, and if the other requirements for representation are satisfied, proof of the named plaintiff's claim will establish the common elements of the non-parties' claims, and a defense to the named plaintiff's claim will serve as a defense to the non-parties' claims. In short, "as goes the claim of the named plaintiff, so go the claims of the class." *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998); *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). Only if this is true—if the named plaintiff satisfies all requirements for a representative suit—will the defendant have had a fair opportunity to be heard on all the claims asserted against it.

Moreover, only if the named plaintiff's claim is genuinely representative of the non-parties' claims can the parties and non-parties alike be bound by the judgment. This Court has made clear that non-parties are bound by judgments in representative suits only where their interests were fairly represented. See *Shutts*, 472 U.S. at 812; *Hansberry*, 311 U.S. at 41; *Ben-Hur*, 255 U.S. at 367. The defendant has as much interest as do the non-parties in the preclusive effect of any judgment rendered in a representative suit, and compliance with Rule 23 ensures that litigation will finally resolve all of the representative claims as to parties and non-parties alike.

Absent compliance with Rule 23, however, the defendant faces a real prospect of multiple liability for the same injuries. If the jury awards punitive damages to one plaintiff based in part on alleged injuries to non-parties, and if the judgment on that jury's verdict is not binding on those non-parties, the defendant may be subject to liability in future lawsuits by the

non-parties seeking compensatory and punitive damages of their own. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 608-609 (7th Cir. 1997) (Posner, J.) ("A plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant"); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) ("We know of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments").

Exposure to such duplicative liability violates the due process principle that "in civil cases *** no man shall be twice vexed for one and the same cause." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-169 (1873); accord *United States* v. *Oregon Lumber Co.*, 260 U.S. 290, 301 (1922). As the Court explained in *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961), a property owner "is deprived of due process of law if he is compelled to relinquish [his property] without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment."

The Court in *State Farm* was well aware of this problem. That is no doubt why it stated that punishment based on non-parties' "hypothetical claims" was improper because it would "create[] the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." 538 U.S. at 423; see also *Gore*, 517 U.S. at 593 (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the *** damages that subsequent plaintiffs would also recover").

Compliance with the requirements of representative actions is thus essential to recovery for harms to non-parties, to ensure both full and fair litigation of the issues and final resolution of the representative claims. As this Court has recognized, "Rule 23 provides specific rules for delineating

the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972). Only upon the named plaintiff's showing that her claim is truly representative of non-parties' claims can a court be confident that the defendant will have an opportunity to present every defense available to those claims. And only upon such a showing can the defendant and non-parties alike be certain that the judgment will preclude subsequent litigation of the same issues. As the Eighth Circuit put it in a recent decision, "[p]unishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff * * * deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure." *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

3. Here, there has been no finding that respondent's fraud claim is genuinely representative of any non-party's claim or that class-wide treatment is otherwise appropriate. Indeed, respondent did not bring this suit as a class action, and for good reason. Fraud claims such as hers rarely are suitable for class treatment, because individualized issues of reliance, causation, and damage are not readily susceptible to generalized proof. *E.g.*, *Castano*, 84 F.3d 745; *Broussard*, 155 F.3d at 341-342; *Andrews* v. *AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996).

To conclude that petitioner was responsible for harm to other smokers in Oregon, the jury would have had to find, by clear and convincing evidence, not only that petitioner made material misrepresentations, but also that all those smokers (1) were aware of the alleged misrepresentations, (2) actually and justifiably relied on those misrepresentations, and (3) suffered physical injuries that were actually caused by their reliance on the misrepresentations. See *Conzelmann* v. *Northwest Poultry & Dairy Prods. Co.*, 225 P.2d 757, 764-765 (Or. 1950) (defining the elements of common-law fraud); *Williams* v. *Philip Morris, Inc.*, 48 P.3d 824, 830 (Or. App. 2002). These are highly individualized issues of fact that

depend on the circumstances of each alleged victim's case; they are not readily susceptible to class-wide proof.

For all these reasons, a plaintiff who could not properly represent non-parties in a class action, and who could not bind them in subsequent litigation, should not be permitted to recover punitive damages based on alleged harm to them. This conclusion comports with "traditional practice" for at least two centuries (*Oberg*, 512 U.S. at 430), and it ensures that juries and courts, in calculating punitive damages, will not adjudicate "other parties' hypothetical claims against a defendant," *State Farm*, 538 U.S. at 423. Because respondent did not meet the settled requirements for representing third parties, petitioner did not have an adequate opportunity to defend against those claims, and imposition of punitive damages based on those claims violated due process.

4. None of this is to say that a defendant's conduct toward non-parties is wholly irrelevant to the calculation of punitive damages. As this Court has said, because "repeated misconduct is more reprehensible than an individual instance of malfeasance," the existence of repetitive conduct may be relevant as long as courts "ensure the conduct in question *replicates* the prior transgressions." *Ibid* (emphasis added). The fact that a defendant has engaged in similar conduct toward others likewise may be relevant to whether the defendant acted intentionally—also an issue of reprehensibility. *Ibid*. Thus, in appropriate cases, evidence of prior misconduct may well be admissible on the issue of punitive damages.

But this simply underscores the importance of adequate instructions to ensure that a jury's proper *consideration* of prior conduct in the reprehensibility analysis does not lead to improper *punishment* for that conduct. As this Court has recognized, "[p]unitive damages pose an acute danger of arbitrary deprivation of property," in part because "[j]ury instructions typically leave the jury with wide discretion in choosing amounts." *Oberg*, 512 U.S. at 432. There is no

guarantee, of course, that a jury will follow an instruction not to punish a defendant for harms to non-parties. But in the absence of such an instruction, the risk is great that a jury *will* in fact punish a defendant for the wrong reasons. Cf. *State Farm*, 538 U.S. at 422 ("A jury must be instructed * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred"). The failure of the courts below to provide for such instruction was unconstitutional.

B. Allowing Plaintiffs To Recover Punitive Damages For Harms To Non-Parties Without Demonstrating That Their Claims Are Genuinely Representative Of The Non-Parties' Claims Also Deprives Defendants Of Reasonable Notice Of The Law's Requirements.

The lower court's decision to allow the jury to punish petitioner for harm to third parties also violated the core due-process principle that a defendant is entitled to adequate notice of the conduct for which it may be punished. As this Court has held, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. A State does not provide adequate notice that defendants may be liable for alleged harms to non-parties where the named plaintiff is not required to satisfy the requirements for class certification or otherwise to demonstrate that her claim is genuinely representative of non-parties' claims. Nor does a defendant receive adequate notice of liability where a jury is permitted to act as regulators of industry-wide practice.

1. This Court has recognized that "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Just as businesses are presumed to consult "relevant legislation" that restricts their activities, so

too may they rely on laws and procedural rules that limit the scope of their potential liability.

The States' class action rules require plaintiffs to satisfy extensive requirements before allowing them to recover for injuries to a class of non-party plaintiffs. See ABA Section of Litigation, *Survey of State Class Action Law—2005* (2005). Oregon is no exception. Much like the Federal Rules of Civil Procedure, Oregon's rules provide that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all *only if*," among other things:

- "joinder of all members is impracticable";
- "[t]here are questions of law or fact common to the class";
- "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class"; and
- "[t]he representative parties will fairly and adequately protect the interests of the class."

Or. R. Civ. P. 32A. "[I]n addition, the court [must] find[] that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," in light of factors such as "[t]he extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Rule 32B. Moreover, where a class proceeding is appropriate only as to "particular claims," "[e]ach subclass must separately satisfy all requirements" except numerosity. Rule 32G.

A defendant such as petitioner, charged with notice of these rules, will understand that its ability to challenge the propriety of a class action turns on the factors outlined above. Absent a rule that permits individual plaintiffs to recover for harms to non-parties by complying with *other* procedures, however, no defendant would reasonably infer that it could be subjected to liability for harms to non-parties where a plaintiff does *not* comply with the class action rules (or at least substantively equivalent rules).

Put another way, the class action rules provide *minimum* requirements for recovering damages for non-parties' harms, and the only reasonable inference to be drawn from Oregon's class action rules is that a civil defendant will be subjected to class-wide liability "only if" (Rule 32A) the plaintiff satisfies those requirements. This is especially so in light of the body of precedent, discussed in Part II.A., holding that multiple claims against a defendant may be resolved in a single case only if the named plaintiff has satisfied the requirements for a representative action.

2. Businesses also lack adequate notice that juries in cases brought by individual plaintiffs will displace governmental authorities as regulators of corporate conduct. "Punitive damages, unrelated to compensation for any injury or damage sustained by a plaintiff, are 'regulatory' in nature rather than compensatory." *Silkwood*, 464 U.S. at 274-275 (Powell, J., dissenting). Ordinarily, regulation is a task committed by statute to government agencies that are broadly aware of the risks and benefits of corporate conduct and thus are able to calculate the level of punishment necessary to deter future misconduct without over-deterring and adversely affecting the market generally.[7]

By contrast, juries in individual tort suits are charged with resolving only specific disputes between "adversaries asserting specific claims or interests peculiar to themselves." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 n.10 (1974). Jurors hear only the facts presented by the parties—subject to rules of evidence that limit the scope of the parties' presentations—and they have no legal mandate (let alone the capacity) to undertake a broader investigation of circumstances beyond the case. This lack of ability to

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[7] See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 878-881 (1998); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 322-327 (1998).

gather information stands "in sharp contrast to the political processes in which the [legislature] can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions." *Ibid.* In sum, juries "may be competent to determine and assess compensatory damages," but "are unlikely, *** to have even the most rudimentary comprehension of what reasonably must be done to assure the safety of *** the public." *Silkwood*, 464 U.S. at 285 (Powell, J., dissenting).

For all these reasons, no company can be considered to be "on notice" that a jury will be allowed to displace elected officials as the principal regulators of its business. For this reason too, it is a violation of due process for a trial court to refuse a jury instruction telling the jury that it is not to punish a defendant for alleged harm to third parties.

* * * * *

Private suits for punitive damages should not be used "as a platform to expose, and punish, the perceived deficiencies of [the defendant's or the industry's] operations throughout the country." 538 U.S. at 420. This Court should enforce that principle here by clarifying that juries considering punitive damages must, at the option of the defendant, be instructed that they may not punish the defendant for unproven harms to non-parties.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A

The **National Association of Manufacturers** ("NAM") is the oldest and largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing in America's economic future. Many of the NAM's members would face enormous financial risk if, as the court below held, juries could punish corporate manufacturers for alleged harm to non-parties without even establishing that those parties are similarly situated to the named plaintiffs. The resulting liability could well bankrupt many manufacturers. At a minimum, it would severely discourage the development, manufacture, and sale of a wide range of products.

The **Pharmaceutical Research and Manufacturers of America** ("PhRMA") is a voluntary, nonprofit association that represents more than 100 of the country's leading pharmaceutical research and biotechnology companies. PhRMA's members discover, develop, and manufacture products—including prescription medicines—that allow millions of patients worldwide to live longer, healthier, and more productive lives. In 2005, PhRMA's members alone annually invested some $39.4 billion in discovering and developing new medicines. PhRMA's members are among the most frequent victims of arbitrary punitive damage verdicts, and of appeals by plaintiffs' lawyers to punish corporate defendants for unproven harm to non-parties. Such practices deter the development and drive up the cost of potentially life-saving medicines—medicines that have passed the most rigorous and extensive safety testing in the world and secured United States Food and Drug Administration ("FDA") approval before going to market.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, a $550 billion enterprise and a key element of the nation's economy. ACC members apply the science of chemistry to make innovative products and services that make the lives of people throughout the country and abroad better, safer, and healthier. ACC is committed to improving environmental, health, and safety performance through Responsible Care®; common sense advocacy designed to address major public policy issues; product testing; and health and environmental research. Many ACC members can be, and have been, subjected to punitive damages awards based on unproven harm to non-parties. The threat of such awards deters ACC members from engaging in nationwide practices that achieve economies of scale and other efficiencies needed to provide special benefits to consumers and maintain uniform quality across their operations.

The **Business Roundtable** is an association of chief executive officers of leading U.S. corporations with millions of shareholders and a combined workforce of more than 10 million employees in the United States. Member companies comprise nearly a third of the total value of the U.S. stock market and represent nearly a third of all corporate income taxes paid to the federal government. Since 1972, Business Roundtable has been devoted to examining policy issues affecting the U.S. economy and developing positions that reflect sound economic and social principles. Business Roundtable has an interest in ensuring that the Court is fully informed about the manner in which current punitive damages procedures—and in particular the practice of allowing juries to punish corporate defendants for unproven harm to non-parties—conflict with established historical and contemporary practice and thus violate the Due Process Clause.

APPENDIX B

Examples of Appeals to Juries for Punitive Damages

1. ***GMAC* v. *Baymon*, No. 95-0072 (Humphreys County, Miss. Cir. Ct. 1997), *rev'd*, 732 So. 2d 262 (Miss. 1999).**

The plaintiff sued GMAC for breach of contract and fraud, claiming that she was overcharged by $762 for collateral protection insurance on her vehicle. During closing argument, the plaintiff's counsel asked the jury to think about "the other victims just like [the plaintiff]," whom he described as "working people on the economic edge, struggling, predominantly *** African-Americans." Tr. 889:26-29, 967:19-23. Plaintiff's counsel then urged the jury to award punitive damages for the "600,000 other Menola Baymon's in Humphreys County, in Sunflower County, in Holmes County, in Memphis, Tennessee, and everywhere else in this country." Counsel told the jury: "You can change the way this insurance is done *** [t]he way people are ripped off across the country, you can stop it." Tr. 967:13-15, 968:19-24, 970:4-6. The jury awarded $35,000 in compensatory damages and another $5 million in punitive damages, 143 times the compensatory award.

2. ***Brown* v. *Borg Warner Corp.*, No. 95-1922 (El Paso, Tex. County Ct. 1998), *aff'd*, No. 08-98-00213-CV (Tex. App. 1999) (unpublished).**

The plaintiff sought recovery for harm from exposure to asbestos in disc brakes. During closing argument, his counsel asked the jury to award punitive damages:

> Ladies and gentlemen, if you feel that what happened to William Brown was a unique situation, if you feel that he was the only mechanic who breathed that dust, if you feel that he was the only worker that was abused by corporate irresponsibility, if you feel that he is the only victim, then perhaps exemplary damages are inappropriate. ***

> But if you feel like I do and if you feel that the evidence said that the Borg Warner Corporation and the asbestos industry ignored for decades knowledge about asbestos and that the Borg Warner Corporation and the asbestos industry turned its back on safety and closed its eyes on the health of others, then it is your duty and responsibility to award a substantial amount of exemplary damages. * * *
>
> And it's your responsibility, not to William Brown individually, but to all the William Browns * * * out there doing their job. It is your responsibility to those people. * * *
>
> And let me assure you, ladies and gentlemen, that your voice will be heard. It will be heard in Chicago by the Borg Warner Corporation. It will be heard by an industry and it will be heard by all the William Browns of the world, and by all the corporations that would turn their back and close their eyes to the safety and welfare of the working people. * * *
>
> [W]hen you award exemplary damages, you establish standards of conduct, standards of decency, standards of corporate accountability, standards of corporate responsibility.

Tr. 34. The jury awarded $200,000 in punitive damages.

3. *Bullock* v. *Philip Morris, USA, Inc.*, No. BC249171 (Los Angeles County, Cal. Super. Ct. 2005), *aff'd*, 138 Cal. App. 4th 1029 (Cal. Ct. App. 2006), *pet. for rev. filed*, No. S143850 (Cal. May 31, 2006).

At trial in a case brought by a smoker against Philip Morris, the plaintiff introduced evidence that cigarette smoking injures thousands of people throughout the state and the nation, and counsel referred to this evidence in his opening statement and closing argument. RT 948, 1354-1355, 4119-4122, 4191-4192. Specifically, counsel argued that for every smoker who sues Philip Morris, 28,000 people have

died from cigarette smoking; and he urged the jury to punish Philip Morris for each death.

> During closing argument, counsel told the jury:
>
> Less than 3,000 people died in the Twin Towers terrorist attack. When I say "less than," that sounds really weird because what an unbelievable human toll; but in the terms we are talking about here, just so we can bring this down, that's a 30-day toll in California alone right now from smoking cigarettes.
>
> Philip Morris is a resourceful foe. Never, ever think Philip Morris is done or cornered or has no options ever. Picture this, please: Special Forces in the desert, after a lot of work and effort, they corner bin Laden. "I won't do it again. I won't do it any more." I could go back in history to bigger worse people and bigger worse atrocities, but think about the concept of what you heard today, that after an evildoer, a wrongdoer, is run to the ground, all that person has to say is, "Oh, okay. I won't do it any more." * * *
>
> And the last thing the judge mentioned is that the punitive damages have to bear a reasonable relationship to the damages sustained by Betty Bullock, whatever that means. And, of course, that is stuff that lawyers, appellate lawyers, and judges and appellate judges talk about, but that's not today.

138 Cal. App. 4th at 1058 nn.19-20.

In addition to $850,000 in compensatory damages, the jury awarded $28 billion in punitive damages, amounting to $1 million for each of 28,000 people mentioned by plaintiff's counsel.

4. *Diamond* v. *General Am. Life Ins. Co.*, No. CV96-02277 (Maricopa County, Ariz. Super. Ct. 1999).

The plaintiff sued General American for failure to pay disability benefits. At trial, the plaintiff was allowed to

introduce evidence that General American had identified 58 policyholders with large potential claims and attempted to buy out their policies. Plaintiff's counsel told the jury in opening statement that they should punish General American "for what [it] did to all of the people whose faces you don't see in this courtroom but whose lives have been as affected [as plaintiff's], if not worse." 2 Tr. 73-74. During closing argument, plaintiff's counsel made repeated references to the "hit list" of other alleged victims. 12 Tr. 57, 58, 77. The jury awarded the plaintiff $58 million in punitive damages—exactly 58 times the amount of compensatory damages. As the trial court recognized, it appeared "almost to a certainty" that the jury arrived at its punitive damage figure by multiplying $1 million by the 58 policyholders. App. at 57 (June 3, 1999 Order).

5. *Aguilar* v. *Ashland Oil Co.*, JCCP No. 2967 (Los Angeles County, Cal. Super. Ct. 1998), *rev'd*, No. B128469 (Cal. Ct. App. 2000) (unpublished).

The plaintiffs sued Ashland Oil Company and other chemical companies for injuries arising from their exposure to organic solvents and other chemicals at their workplace. The plaintiffs alleged that the chemical manufacturers failed to warn them about health risks associated with their products. The jury found the defendants liable and awarded the plaintiffs more than $25 million in compensatory damages.

The trial court began the punitive damages phase by instructing the jury that it should "make an example of [defendants] to the whole world." RT 3902. Plaintiffs' counsel then argued that the purpose of the jury's punitive award should be "to say, corporate America, you can't do this anymore * * * [y]ou've got to start doing the right thing and since they did not do the right thing and * * * since they had a conscious disregard, you, ladies and gentlemen, must do the right thing for them." RT 3923-3924.

After these closing arguments, the court again addressed the jury:

> How much money is it going to take to send home a message to five of the biggest corporations in the world that this isn't going to be done anymore. *** So pick a figure and say, let's send a notice out to the world, this is the price in Los Angeles County. *** Now, do you want to set any example for the world? It is not just the people here, or the people in Los Angeles County or the State of California or the United States, it is world wide. These people sell chemicals every place, you see. Do we want to send a message that this conduct will not countenance [sic] in the least in Los Angeles Counties [sic]? That is your decision. *** Every chemical manufacturer in the United States that makes these chemicals is going to see this decision and say, boy, we better be very careful on hw we distribute this product, we better go the extra mile. If we don't, you know, we are going to get burned.

RT 3935-3942. The jury awarded the plaintiff $760 million in punitive damages.

6. *McKendry* v. *General Am. Life Ins. Co.*, No. CIV 96-0754 (D. Ariz. 1999).

The plaintiff sued General American for bad faith in connection with its decision to terminate his long-term disability benefits. In asking for punitive damages, plaintiff's counsel told the jury:

> [R]ight now, you are probably the eight most knowledgeable people about how disability insurance should be operated, and shouldn't be operated. Probably the eight most knowledgeable in this state, even more knowledgeable than adjusters who maybe work in the field, because you have seen evidence from the top to the bottom about how the system work.
>
> You know if—if Senator McCain wanted to pass a law that would address the kind of issue you heard, he'd

> have to hold hearings, and he'd have to caucus with his supporters and other people in the Senate. And even if it was his top legislative priority, there's a good chance he would never get anything passed to address this problem.
>
> And if Judge Rosenblatt wanted to do something, there's really not anything that he can do. And our—in our government, our system puts that power in your hands for a brief period of time. And then you lose the power again, and you may never get that kind of power to influence the way the world works ever again.

Tr. 1912. Plaintiffs' counsel also discussed harms to non-parties, arguing:

> So you've got the harm that was done to Steve [the plaintiff], you've got the harm that was done to the other 57 people targeted, you've got the harm to the other people in this book of business who the * * * witnesses said were treated the same way, and you've got the harm to other * * * insureds, and you have the harm to people insured by [other companies], who wind up having their claims handled in the [same] way.

Tr. 1915. The jury awarded the plaintiff $17 million in punitive damages, more than 48 times the compensatory award.

7. *Engle* v. *Liggett Group, Inc.*, No. 94-08273 (Dade County, Fla. Cir. Ct. 2000), *rev'd*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *aff'd in part and rev'd in part*, 2006 WL 1843363 (Fla. July 6, 2006).

The plaintiffs sued several tobacco companies for injuries allegdly caused by smoking. During closing argument, plaintiffs' counsel told the jury: "And let's tell the truth about the law, before we all get teary-eyed about the law. Historically, the law has been used as an instrument of oppression and exploitation. * * * If you admit that you sell a product that causes cancer—I admit my product causes

cancer—and if you also admit it's also addictive, get out of the business. That's the only moral, ethical, religious, decent judgment to make * * *. If you sell a product which causes cancer and which is addictive, stop selling it. Stop selling it, because you know it's doing unbelievable harm to your fellow Americans. * * * [The defendants say] [i]t's a legal product. It's a legal product. Legal don't make it right. Legal don't make it right." 853 So. 2d at 459-460.

8. *Frankson* v. *Brown & Williamson Tobacco Corp.*, 781 NY.S.2d 427 (Kings County, N.Y. Sup. Ct. 2004), *aff'd sub nom. Frankson* v. *Philip Morris Inc.*, 2006 WL 1851266 (N.Y. App. Div. July 5, 2006).

In another smoking case, plaintiff's counsel asked the jury "to send a message to the defendant * * * and not just the defendant, but the tobacco industry and to corporate America as well." William Glaberson, *Punitive Award Sought for Smoker's Widow*, N.Y. Times (Jan. 8, 2004), at B3. Counsel continued, "You have the power, and if you don't do it, who will? Not President Bush. Not Governor Pataki. Not Judge Kramer." *Punitive Award Asked of Jury in Tobacco Suit*, N.Y.L.J. (Jan. 8, 2004), at 1. The jury awarded the plaintiff $20 million in punitive damages, nearly 60 times the compensatory award.

9. *Batson* v. *Wyeth* and *Wirt* v. *Wyeth*, Nos. 99CV0306 & 99CV0307 (Coos County, Ore. Cir. Ct. 2000).

The plaintiffs in these cases alleged that the pharmaceutical Pondimin (sometimes included in the combination known as "fen-phen") was unreasonably dangerous. During closing argument, counsel told the jury:

> There's been a lot of times in this case that I have kind of felt sorry for you. The testimony, although you've listened to it well, has sometimes been a little bit boring, and sometimes been a little bit tedious, but right now I envy you. You are more powerful right now than I'll ever be. You are more powerful than anyone in this

> room, in this city, in this state, or in this nation with regard to what you can say to a huge drug company and how you can get them to change.
>
> My faith, ladies and gentlemen, in the jury system is whole, it is complete. I believe that as you sit here today, that you are the voice of this community, this county, this state, this nation. I believe that as you sit here today, you sit upon the shoulders of every man and every woman that ever sat in that seat before. I believe that you sit upon the shoulders of giants. I believe that you have the ability to make huge changes in the pharmaceutical industry and to make a huge change in this company. Send them a message.
>
> Your verdict is going to be read by their employees. Your verdict is going to be read by their CEO and by their board of directors, and by boards of directors of every pharmaceutical company in the world.

Tr. 195-197. The jury awarded $25.35 million in punitive damages.

10. *Rodriguez* v. *Suzuki Motor Co.*, No. 902-08691 (St. Louis, Mo. Cir. Ct. 1995), *rev'd*, 936 S.W.2d 104 (Mo. 1996).

The plaintiff sued an auto maker for injuries resulting from the rollover of a sport-utility vehicle. Plaintiff's counsel argued to the jury: "[Y]our job *** is to stop that line of victims from growing anymore, *** to stop that indifference, ***. It needs to be stopped right now, right here, before somebody else loses their life or gets maimed like [the plaintiff] has been." Counsel continued: "[N]obody else is going to stop this. *** The government's not going to do anything. The only way to stop the kind of misconduct that you've heard about in this case *** is with the amount of your punitive damages verdict. *** You are the regulators." The jury awarded the plaintiff $60 million in punitive damages.

11. *Campbell* v. *State Farm Mut. Auto. Ins. Co.* (Salt Lake County, Utah Dist. Ct. 1996), *aff'd in part and rev'd in part*, 65 P.3d 1134 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

The plaintiff sued State Farm for bad faith, fraud, and intentional infliction of emotional distress in connection with State Farm's failure to settle a lawsuit within the policy limits. During closing argument, counsel told the jury: "The only regulators of insurance companies are juries like you. You are the ones that hear, investigate and listen to the evidence and impartially make decisions regarding the actions of insurance companies.* * * Why are you important? Because you are the regulators. We do not have objective and effective regulators of the insurance industry." J.A. 3217a-3218a (No. 01-1289). The jury awarded $145 million in punitive damages, on top of a $2.6 million compensatory award.

12. *City of Modesto* v. *Dow Chem. Co.*, Nos. 999345 & 999643 (San Francisco County, Cal. Super. Ct. 2006).

The City of Modesto, California sued dry cleaners, makers of perchloroethylene, and makers of dry cleaning equipment, alleging that perchloroethylene was defective and that the defendants had contaminated city water. During closing argument, the City's counsel argued: "What would a responsible corporation do if they learned that their product was in 10 percent of the wells in the country? * * * If you know that your product has caused a problem of that magnitude, you can't blame it on a mom-and-pop dry cleaner. That couldn't do something all over the country. " Tr. 6630:25-26, 6631:6-9 (May 23, 2006)."

Later in the argument, counsel told the jury: "[T]hey acted in conscious disregard of cities like Modesto and other communities throughout the country. After all, if we're talking about 10 percent of the wells in America, you're talking about the water supply for very large numbers, probably millions of people." Tr. 7017:7-12 (May 31, 2006).

"In the last analysis," counsel concluded, "this is really about corporate accountability. * * * There's a problem in a world without consequences where adults, and in this case corporations, aren't held to standards that every one of us are held to every day, and that problem is that the very things we have laws to deter are ignored. * * * Whatever you do, it will be a message. Make sure that it's a message to these defendants that says never again, and that's the right thing to do." Tr. 8079 (June 13, 2006). The jury awarded $3.2 million in compensatory damages and another $175 million in punitive damages.

13. *Lopez* v. *Am. Home Prods.*, No. 99-07-37725-CV (Jim Wells County, Tex. Dist. Ct. 2001).

The plaintiff alleged that fen-phen caused certain adverse health effects. In asking the jury for punitive damages, her counsel argued: "I think an adequate amount of damage, an adequate amount of punishment, a message to Washington, New Jersey and Pennsylvania would be $107 million if her heart was damaged by 10 percent." Tr. 194-196 (Apr. 2, 2001). The jury awarded $45 million in punitive damages.

14. *Gunderson* v. *Sandoz Pharms. Corp.*, No. 94-CI-04680 (Jefferson County, Ky. Cir. Ct. 2004), *aff'd in part*, *Sandoz Pharms. Corp.* v. *Gunderson*, 2005 WL 2694816 (Ky. Ct. App. Oct. 21, 2005).

The plaintiff sued the manufacturer of the medication Parlodel, alleging that it had caused the decedent's death. In support of a request for punitive damages, plaintiff's counsel argued:

> A lot of times when I sit back and you guys, too, probably, and you watch the news, or you read the newspaper * * * about corporate misconduct or corporate misdeeds, and you say, well, you know, there's nothing I can do about it, there's nothing I can do about it, but as a collection of 12 people, there's a heck of a lot you can do about it. Collection of you all together looking at the

> facts and deciding it based upon the facts and the law that the judge gives you, then you can make a real statement. *** [I]f you're going to deter people that operate out of Switzerland all over the world, then you've got to decide how in the world do we do it.

The jury awarded the plaintiff $11.3 million in punitive damages.

15. *Ingram* v. *Liberty Nat'l Life Ins. Co.*, No. CV-96-62 (Chambers County, Ala. Cir. Ct. 2002), *rev'd on other grounds*, 887 So. 2d 222 (Ala. 2004).

The plaintiff in this case sued Liberty National for fraud, suppression, deceit, wantonness, civil conspiracy, bad faith, and conversion in connection with the sale of an insurance policy. In closing argument, the plaintiff's counsel told the jury: "Might as well throw seven million to put a heart into this bunch over here. *** I hope and pray that y'all will make it worth that for the rest of the people in Chambers County, that this will stop. It will have effects all over Alabama and everywhere else that they've got agents." Tr. 759-760. The jury awarded the plaintiff $200,000 in compensatory damages and another $3 million in punitive damages.

16. *Coffey* v. *Wyeth*, No. E-167,334 (Jefferson County, Tex. 2004).

In this fen-phen case, plaintiffs' counsel asked the jury,: "How many times do you have to pick up newspapers and keep reading over and over again, the drugs on the market had to be taken off because they're dangerous, or because some black box warning has to be given because they're dangerous, after years of being on the market." Tr. 120-121. Counsel then suggested that "[t]he number ought to be over what they made off selling this drug and going through all the shenanigans that they went through, significantly over it. Because only then will they say, oops, this is not a profitable

way to do things." Tr. 134. The jury awarded $900 million in punitive damages.

17. *Cook* v. *Rockwell Int'l Corp.*, No. 90-CV-00181 (D. Colo. 2006).

The plaintiffs sued for nuisance, alleging that the defendants had caused radioactive contamination of their properties, decreasing their value. Plaintiff's counsel asked the jury to "tell Rockwell, to tell Dow, corporate America, even DOE, this will not be tolerated anymore in our communities. Stop the wrongdoing. Stop the lying for once in 50 years, give the neighbors some justice." Tr. (Jan. 21, 2006). The jury awarded $200 million in punitive damages.

18. *Sunburst Sch. Dist. No. 2* v. *Texaco Inc.*, No. CDV-01-179(a) (Cascade County, Mont. Dist. Ct. 2004).

A group of 75 Montana landowners sued Texaco seeking damages for the effects of a gasoline pipeline leak that occurred in 1955 at a now-defunct refinery. Texaco sought to introduce evidence that it had cooperated with Montana's Department of Environmental Quality to investigate and remediate the site, but the trial court excluded the evidence. See Kathleen A. Schultz, *Texaco to Appeal Sunburst Ruling*, Great Falls (Mont.) Tribune (Aug. 20, 2004). In closing argument, plaintiffs' counsel urged the jury to "send a message" to "others in the industry," to "warn [them] as to what the standards should be." Tr. 3082, 3107 (Aug. 18, 2004). The jury awarded $25 million in punitive damages. See Schultz, *supra*.

19. *Avco Corp.* v. *Interstate Sw. Ltd.*, No. 29,385 (Grimes County, Tex. 278th Dist. Ct. 2005), *appeal docketed*, No. 15-05-00860-CV (Tex. App.).

In this commercial fraud case relating to the manufacture of allegedly defective aircraft parts, plaintiff's counsel asked the jury to impose a large punitive damages award because "[t]hey are not going to redesign this crankshaft based upon your verdict. They are not going to do anything. * * * They

are still excusing it." Tr. 82-85 (Feb. 15, 2005). The jury awarded the plaintiff $86.4 million in punitive damages, more than 20 times the compensatory award.

20. *Flores* v. *Borg-Warner Corp.*, No. 98-4954-G (Nueces County, Tex. 319th Dist. Ct. 2002), *aff'd*, 153 S.W.3d 209 (Tex. App. 2004), *pet. for rev. granted*, No. 05-0189 (Tex. Apr. 21, 2006).

The plaintiff sued Borg-Warner for damages arising from his use of brake pads that contained asbestos. His counsel urged the jury to "send a message that the people of Corpus Christi, Texas are not gonna put up with this kind of behavior from Borg-Warner or from any other corporation." Tr. 21. The jury awarded $50,000 in punitive damages.

21. *Lovett* v. *Wyeth*, No. 97-665 (Van Zandt County, Tex. 294th Dist. Ct. 1999).

In the first fen-phen case tried to a jury, plaintiff's counsel told the jury: "You have unbelievable power. A jury has the most power of any non-elected government entity, because you have the power to tell this company that they did wrong and that they should pay for it. You have the power to try to get their attention. * * * So when you get back there and you deliberate on this case, keep that in mind, that you have the power in this first fen-phen case in the history of our country, you have the power to tell them you had better do it right the next time." Tr. 109-111. The jury awarded the plaintiff $20 million in punitive damages.